

FRIDAY, MARCH 23, 1979

PART XI



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# MERIT SYSTEMS PROTECTION BOARD

INTERIM OPERATING  
PROCEDURES: FREEDOM OF  
INFORMATION, PRIVACY, AND  
GOVERNMENT IN THE SUNSHINE  
ACTS; PROPOSED ADJUDICATORY  
PROCEDURES

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[6325-20-M]

## Title 5—Administrative Personnel

CHAPTER II—MERIT SYSTEMS  
PROTECTION BOARD

[Docket No. 79-2 Notice 1]

INTERIM OPERATING PROCEDURES:  
FREEDOM OF INFORMATION ACT;  
PRIVACY ACT; GOVERNMENT IN  
THE SUNSHINE ACT

AGENCY: Merit Systems Protection Board.

ACTION: Interim Regulation; request for comments.

SUMMARY: These regulations establish interim operating procedures for the Merit Systems Protection Board pursuant to the requirements of the Freedom of Information Act; the Privacy Act; and the Government in the Sunshine Act. In addition, the Merit Systems Protection Board requests public comment on these regulations.

EFFECTIVE DATE: March 20, 1979. Written comments should be submitted on or before May 22, 1979.

ADDRESS: Comments should be addressed to the Office of the Secretary of the Merit Systems Protection Board, 1717 H Street, N.W., Washington, D.C. 20419.

FOR FURTHER INFORMATION  
CONTACT:

Alan Greenwald or Deborah House  
(202-653-7101).

SUPPLEMENTARY INFORMATION: The Board was created pursuant to Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act of 1978 (Pub. L. 95-454) signed into law by President Carter on October 13, 1978.

The Reorganization Plan and the Act contemplated that the Board would immediately begin to function as an agency subject to the provisions of the Freedom of Information, Privacy and Government in the Sunshine Acts. Accordingly, it is necessary to adopt regulations which serve a dual role as interim operating procedures and proposed regulations for comment.

Part 1204 of these regulations implements the provisions of the Freedom of Information Act as set forth at 5 U.S.C. 552. It is the policy of the Board to make full and complete disclosure of all information within its control under this Act unless specifically exempted and disclosure would not be in the interest of the public.

Part 1205 of these regulations implements the provisions of the Privacy Act as set forth at 5 U.S.C. 552a. It is the policy of the Board to fully protect the privacy interests of each indi-

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vidual by insuring the confidentiality of records; by limiting information in those records to that which is relevant and necessary to the functions of the Board and by facilitating access of an individual to his/her record.

Part 1206 of these regulations implements the provisions of the Government in the Sunshine Act as set forth at 5 U.S.C. 552b. It is the policy of the Board to conduct all proceedings in open meetings unless to do so is specifically exempted under the Act and would not be in the interest of the public.

Interested parties may participate in this proposed rulemaking by submitting their views, in writing, to the Board. Each comment should include the name and address of the person or organization submitting the comment and should make reference to the above-cited docket number. All comments received on or before May 22, 1979 will be considered in promulgating final regulations on the matters addressed here. All written comments received will be docketed and made available for public inspection at the Board.

These regulations do not include a notice of system of records as is annually required to be published under the Privacy Act. Publication of this notice has been delayed pending the official establishment of the Board's record systems. Publication shall occur as soon as these systems are established and identified.

The Board has determined that the January 1, 1979 effective date of Reorganization Plan No. 2 of 1978 and the January 11, 1979 effective date of the Civil Service Reform Act of 1978 establishes good cause for immediate publication of these regulations for interim effect.

Issued on March 20, 1979.

RUTH T. PROKOP,  
Chair, Merit Systems  
Protection Board.

5 CFR is amended by adding Parts 1204-1206 to read as follows:

PART 1204—FREEDOM OF  
INFORMATION ACT

## Subpart A—Purpose and Policy

Sec.

1204.1 Purpose.

1204.2 Policy.

## Subpart B—Procedures for Obtaining Records

1204.11 Submission of request.

1204.12 Time limitations.

1204.13 Fees.

1204.14 Denials.

## Subpart C—Appeals

1204.21 Submission.

1204.22 Determinations upon appeal.

AUTHORITY: 5 U.S.C. § 552.

## Subpart A—Purpose and Policy

## § 1204.1 Purpose.

The purpose of this part is to set forth the procedures pursuant to the Freedom of Information Act (5 U.S.C. 552) ("the Act") by which the public may obtain records controlled by the Board.

## § 1204.2 Policy.

(a) It is the policy of the Board to release records where:

(1) the request submitted reasonably describes such records; and

(2) is made in accordance with the rules of this part.

(b) Records shall be disclosed to a requestor unless:

(1) they are exempt from disclosure under subsection (b) of the Act; and

(2) disclosure of such records would not be in the public interest.

Subpart B—Procedures for Obtaining  
Records

## § 1204.11 Submission of request.

(a) *Place:* Requests for copies of records shall be made to the appropriate field office of the Board or the Office of the Secretary of the Board at 1717 H Street, N.W., Washington, D.C. 20419. It is appropriate to submit a request to a field office if the requestor has reason to believe the records in question are located in that office. Requests shall be made during normal business hours, or submitted by mail. Although oral requests may be honored, a requestor may be required to submit his/her request in writing.

(b) *Form:* Each submission shall reasonably describe the record requested including any name, subject matter and number or date where possible so that the Board can identify and locate the record. Requests submitted by mail shall be clearly marked as a "FREEDOM OF INFORMATION ACT REQUEST" on both the envelope and letter.

(c) *Payment:* The request shall be accompanied by the fee or an offer to pay the fee pursuant to § 1204.14 of this part.

## § 1204.12 Time limitations.

(a) Determinations of whether to comply with an original request for agency records shall be made within ten days (excluding Saturdays, Sundays, and legal public holidays) except in "unusual circumstances" as provided in paragraph (b) of this section.

(b) In "unusual circumstances" the time limits specified above may be extended by written notice to the requestor setting forth reasons for such an extension and the date on which a determination is expected to be made.

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No such notice shall specify a date that would result in an extension for more than ten working days. Unusual circumstances means:

(1) The need to search for and collect the requested records from field facilities or other establishments which are separate from the office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(c) Where a request or an appeal is not properly labeled or is submitted to an inappropriate office, the time limitation for processing of the request shall run from the time it is received by the proper official to process such a request.

#### § 1204.13 Fees.

(a) Requests for records are subject to the following fees for search and duplication.

(1) Photocopies \$0.10 for the first copy of each page.

(2) Manual records search:

(i) First hour and any single request: no fee.

(ii) Each additional hour or fraction thereof: \$5.00.

(iii) Fees for search and duplication of automated records shall be provided upon request.

(b) At their discretion, the Secretary or appropriate field official may refuse to furnish records prior to receipt of the required fee.

(c) At their discretion, the Secretary or appropriate field official shall furnish records without charge or at a reduced charge where to do so primarily benefits the general public.

#### § 1204.14 Denials.

(a) Denials of a request for records in whole or in part shall be issued in writing within the applicable time limits.

(b) Denials shall set forth the basis for the denial and the right of the requestor to appeal the denial to the Chair under subpart C of this part.

#### Subpart C—Appeals

##### § 1204.21 Submission.

(a) *Time:* Appeals shall be submitted within thirty days of the date of the issuance of the written denial.

(b) *Place:* Appeals shall be addressed to the Chair, Merit Systems Protec-

tion Board, 1717 H Street, N.W., Washington, D.C. 20419.

(c) *Form:* Appeals shall be clearly marked as "FREEDOM OF INFORMATION ACT APPEAL" on both the envelope and letter. Appeals must be in writing and shall include:

(1) a copy of the original request or a statement thereof if it was made orally;

(2) a copy of the written denial; and

(3) a statement of the reasons why the original denial should be overruled.

#### § 1204.22 Determinations upon appeal.

(a) Determinations upon appeal shall be made within twenty days of receipt of appeal by the Chair (excluding Saturdays, Sundays and legal public holidays).

(b) A determination overruling or sustaining the original denial in whole or in part shall be provided to the requestor and shall set forth the reasons therefore.

(c) A determination upon appeal shall constitute final agency action and the right to judicial review shall be set forth therein.

### PART 1205—PRIVACY ACT

#### Subpart A—Purpose and Policy

##### Sec.

1205.1 Purpose.

1205.2 Policy.

1205.3 Definitions.

#### Subpart B—Procedures for Obtaining Records

1205.11 Submission of request.

1205.12 Time limitations.

1205.13 Identification.

1205.14 Grant of access.

1205.15 Medical records.

1205.16 Fees.

#### Subpart C—Amendment of Records

1205.21 Request for amendment.

1205.22 Action on request.

1205.23 Time limitations.

#### Subpart D—Appeals

1205.31 Submission of appeal.

1205.32 Determinations upon appeal.

Authority: 5 U.S.C. § 552a.

#### Subpart A—Purpose and Policy

##### § 1205.1 Purpose.

The purpose of this part is to set forth the procedures pursuant to the Privacy Act (5 U.S.C. 552a) ("the Act") by which a requestor may make an inquiry regarding a record, gain access to such record or amend the record.

##### § 1205.2 Policy.

It is the policy of the Board to facilitate the full exercise of rights conferred by the Act upon individuals and to insure the privacy of records maintained regarding such individuals. Such records shall contain only that

information which is relevant and necessary to the functions of the Board and shall be treated in a manner which is fully in accordance with the provisions of the Act.

#### § 1205.3 Definitions.

The definitions of 5 U.S.C. 552a apply to this part and are incorporated herein by reference. As used in this part:

"Inquiry" means a request by an individual as to whether the Board has a record which pertains to that individual.

"Request for access" means a request by an individual to inspect or copy a record.

"Request for amendment" means a request by an individual to change the substance of a particular record by addition, deletion or other correction.

"Requestor" means the individual requesting access or amendment to a record. The individual may be either the person to whom the record requested pertains or a legal guardian acting on behalf of an individual.

#### Subpart B—Procedures for Obtaining Records

##### § 1205.11 Submission of request.

(a) *Place:* Inquiries or requests for access to records shall be made to the appropriate field office of the Board or the Office of the Secretary of the Board at 1717 H Street, N.W., Washington, D.C. 20419. It is appropriate to submit a request to a field office if the requestor has reason to believe the records in question are located in that office.

(b) *Form:* Each submission shall contain the following information:

(1) Name, address and telephone number of the individual making the request;

(2) Name, address and telephone number of the individual making the request if the requestor is either a parent or a minor child, or the legal guardian or representative of an individual to whom the record pertains. In addition, evidence of the relationship must be supplied such as: an authenticated copy of the birth certificate of the minor child; or the court document appointing the individual legal guardian; or an agreement for representation signed by the individual to whom the record pertains and the representative;

(3) Name and location, if known, of the system of records as published in the FEDERAL REGISTER;

(4) Such additional information as may assist the Board in responding to the request (for example the name of the agency which is taking the action, the subject matter of the case, etc.);

(5) Date of inquiry;

(6) Individual's signature;

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(7) Indication both on the envelope and the letter that the inquiry is a "PRIVACY ACT REQUEST."

(c) Each submission shall comply with the identification requirements set forth in § 1205.13 of this part.

## § 1205.12 Time limitations.

(a) Response to an inquiry or request for access shall be made within ten days (excluding Saturdays, Sundays and legal public holidays), except in "unusual circumstances" as provided in paragraph (b) of this section.

(b) "Unusual circumstances":

(1) An extensive search of records is required;

(2) The records in question are not readily available;

(3) Information regarding another individual(s) must be expunged from the records;

(4) Consultation with other agencies having substantial interest in the records is necessary; or

(5) Other extenuating circumstances exist which reasonably prohibit the Board from processing the request within the ten day period.

(c) Where a request is not properly labeled or is submitted improperly or it is necessary to obtain further information or identification from the requestor, the time limitation for processing the request shall run from the time when it is received by the proper official to process such a request or necessary additional information is obtained from the requestor. Where it is necessary to obtain additional information the request for such information shall be made by the Secretary or appropriate field official within the ten day period.

## § 1205.13 Identification.

(a) *In person.* Each individual making a request in person shall be required to present satisfactory proof of identity. In order of preference the following items shall be acceptable:

(1) A document bearing the requestor's photograph; or

(2) A document bearing the individual's signature.

(3) In the event (1) or (2) are not available, the requestor will be required to sign a statement asserting his/her identity and acknowledging the requestor's understanding that misrepresentation of identity in order to obtain a record is a misdemeanor and subject to a possible fine of \$5,000 under 5 U.S.C. § 552a(i)(3).

(b) *By mail.* The identification of a requestor making a request by mail must be certified by a notary public or equivalent official or other information sufficient to identify the requestor.

(c) *Parents of minors, legal guardians and representatives.* Parents of minors, legal guardians and repre-

sentatives must submit identification pursuant to paragraphs (a) or (b) of this section. Additionally, they must present an authenticated copy of the minor's birth certificate, court order of guardianship, and agreement of representation where appropriate.

## § 1205.14 Grant of access.

(a) The alternative following methods of access may be granted for inspection of records:

(1) Personal inspection during normal business hours;

(2) Transfer of records to a suitable Federal facility in closer proximity to the requestor;

(3) Provision of copies by mail.

(b) An individual seeking personal access to records may be accompanied by another individual of his/her choice. However, the requestor shall be required to sign a written statement authorizing the discussion and presentation of his/her record in the accompanying individual's presence.

## § 1205.15 Medical records.

When a request for access involves medical records which are not otherwise exempt from disclosure, the requestor may be advised, as necessary, that the records will be disclosed only to a physician designated by the requestor. Upon proper identification the physician will be permitted access to the records as provided in this part.

## § 1205.16 Fees.

(a) No fees shall be charged by the Board for any other purpose than making copies of records.

(b) It is the policy of the Board to provide one copy of a record upon request free of charge. However, where the requested record exceeds fifty pages, the Board shall charge \$0.10 for each copy in excess of that amount.

(c) It is the policy of the Board to provide one copy of any amended record free of charge as evidence of the amendment.

## Subpart C—Amendment of Records

### § 1205.21 Request for amendment.

(a) A request for amendment of a record shall be made to the appropriate field office of the Board or the Office of the Secretary of the Board at 1717 H Street, N.W., Washington, D.C. 20419. The request shall be in writing and shall be designated on the outside of the envelope and the letter as a "PRIVACY ACT REQUEST" and shall include the following information:

(1) Identification of the record to be amended;

(2) A description of the amendment requested (e.g., addition, deletion, placement of amendment, etc.);

(3) A statement of the basis for the amendment and supporting documentation if any.

(b) The provisions for amendment of the record are not intended to permit the alteration of evidence to be presented in the course of adjudication before the Board.

### § 1205.22 Action on request.

(a) *Amendment granted:* Where the amendment requested is granted the requestor shall be so notified and shall be supplied a copy of the amendment as evidence thereof.

(b) *Amendment denied:* Where the amendment requested is denied in whole or in part the requestor shall be notified of the denial in writing and provided the following information:

(1) The basis for the denial; and

(2) The procedures for appealing the denial.

### § 1205.23 Time limitations.

A determination to grant or deny a request for amendment shall be made within ten days after receipt by the appropriate official.

## Subpart D—Appeals

### § 1205.31 Submission of appeal.

(a) *Time:* Appeals from denial of amendment shall be submitted within thirty days of the date of the issuance of the written denial (excluding Saturdays, Sundays and legal public holidays).

(b) *Place:* Appeals shall be addressed to the Chair, Merit Systems Protection Board, 1717 H Street, N.W., Washington, D.C. 20419.

(c) *Form:* Appeals shall be in writing and clearly marked as "PRIVACY ACT APPEAL" on both the envelope and letter. Appeals must be in writing and shall include:

(1) a copy of the original request for amendment;

(2) a copy of the written denial; and

(3) a statement of the reasons why the original denial should be overturned.

### § 1205.32 Determinations upon appeal.

(a) A written determination either overruling or sustaining the original denial shall be made within thirty days (excluding Saturdays, Sundays, and legal public holidays) unless the Chair determines that there is good cause for extending the thirty day period. Where an appeal is not properly labeled or is submitted to an inappropriate official, the time limitation for processing the request shall run from the time it is received by the Chair.

(b) If the amendment is granted upon appeal, the Chair shall direct the amendment be made and shall supply

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the requestor with a copy of the amended record as evidence thereof.

(c) If the amendment is denied, the Chair shall notify the requestor of the denial and inform him/her of the following:

- (1) The basis for the denial;
- (2) The right to file a concise statement with the Board stating the reasons for his/her disagreement with the denial which shall become a part of the record; and
- (3) The right to judicial review of the decision under 5 U.S.C. 552a(g)(1)(A).

**PART 1206—OPEN MEETINGS****Subpart A—Purpose and Policy**

Sec.

- 1206.1 Purpose.  
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1206.3 Definitions.

**Subpart B—Procedures**

- 1206.4 Notice of meeting.  
1206.5 Change in meeting plans after notice.  
1206.6 Determination to close meeting.  
1206.7 Record of meetings.  
1206.8 Provision of information to the public.

**Subpart C—Conduct of Meetings**

- 1206.11 Meeting place.  
1206.12 Role of observers.

AUTHORITY: 5 U.S.C. § 552b

**Subpart A—Purpose and Policy****§ 1206.1 Purpose.**

The purpose of this part is to set forth the procedures pursuant to the Government in the Sunshine Act (5 U.S.C. 552b) ("the Act") by which the Board will conduct open meetings.

**§ 1206.2 Policy.**

It is the policy of the Board to provide the public with the fullest practicable information regarding the decision-making processes of the Board. Board meetings involving deliberations which determine or result in the joint conduct or disposition of official Board business are presumptively open to the public. It is the intent of these regulations to open such meetings to public observation while protecting individuals' rights and the Board's ability to carry out its responsibilities. Board meetings will be closed in whole or in part only in accordance with the exemptions provided under 5 U.S.C. 552b(c) and where to do so is in the public interest.

**§ 1206.3 Definitions.**

In this part:  
"Meeting" means the deliberations of at least two Board Members where

such deliberations determine or result in the joint conduct of official Board business.

"Member" means one of the Members of the Merit Systems Protection Board.

**Subpart B—Procedures****§ 1206.4 Notice of meeting.**

- (a) Notices of Board meetings shall be published in the FEDERAL REGISTER at least one week prior to the meeting. Such notice shall include the following information:
- (1) Time;
  - (2) Place;
  - (3) Subject of meeting;
  - (4) Whether the meeting is to be opened or closed; and
  - (5) The name and telephone number of a Board official responsible for receiving inquiries regarding the meeting.

(b) The Board may, by majority vote, provide less than one week's notice and then such notice be provided at the earliest practicable time.

**§ 1206.5 Change in meeting plans after notice.**

(a) Following notice of a meeting, the time or place of a meeting may be changed only if the change is announced publicly at the earliest practicable time.

(b) Following notice of a meeting, the subject matter of a meeting or the determination to open or close a meeting may be changed only if both of the following conditions are met:

- (1) There must be a majority, recorded vote of the Board members that Board business requires the change and that no earlier announcement of such changes was possible; and
- (2) there must be a notice of the change in the FEDERAL REGISTER and of the individual Board Members' votes at the earliest practicable time.

**§ 1206.6 Determination to close meeting.**

(a) *Basis:* The Board, by majority vote, may determine to close a meeting in accordance with the provisions of 5 U.S.C. 552b(c)(1-9) and where it is in the public interest.

(b) *General Counsel Certification:* Where the Board has determined that a meeting shall be closed in whole or in part, the General Counsel shall certify the propriety of doing so and state the basis therefor.

(c) *Vote:* Where the Board has voted to close a meeting, within one day of such vote the Board shall make publicly available a record reflecting the vote of each Member on the question. In addition, within one day of any vote which closed a portion or portions of a meeting to the public, the Board shall

make publicly available a full written explanation of its decision to close together with a list naming all persons expected to attend and identifying their affiliation, unless such disclosure would reveal the information that the meeting itself was closed to protect.

**§ 1206.7 Record of meetings.**

(a) *Closed Meeting:* Where the Board has determined that a meeting shall be closed in whole or in part the following record shall be maintained:

- (1) a transcript or recording of the proceeding;
- (2) a copy of the General Counsel's certification;
- (3) a statement from the presiding official setting forth the time and place of the meeting and the persons present; and
- (4) a recordation of all votes and all documents considered (which may be part of the transcript).

(b) *Open Meetings:* Transcripts or other recordations shall be made of all open meetings of the Board and shall be made available upon request at actual cost.

**§ 1206.8 Provision of information to the public.**

Information available to the public under this part shall be made available at the Office of the Secretary, Merit Systems Protection Board, 1717 H Street, N.W., Washington, D.C. 20419. Individuals or organizations having a special interest in activities of the Board may submit a request with the Office of the Secretary to be placed on a mailing list for receipt of information available under this part.

**Subpart C—Conduct of Meetings****§ 1206.11 Meeting place.**

Meetings shall be held in meeting rooms designated in the public announcement. Whenever the number of observers is greater than can be accommodated in the meeting room designated, alternative facilities shall be made available to the extent possible.

**§ 1206.12 Role of observers.**

The public may attend open meetings for the sole purpose of observation. Observers may not participate in meetings unless expressly invited to do so. Observers may not create distractions which interfere with the conduct and disposition of Board business and may be asked to leave if they do so. For the portions of meetings which are partially closed, observers shall leave the meeting room upon request.

[FR Doc. 79-9092 Filed 3-22-79; 8:45 am]

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(6325-20-M)

**MERIT SYSTEMS PROTECTION BOARD**

(Docket No. 79-1 Notice 1)

(5 CFR Parts 1200-1202)

**ORGANIZATION AND PROCEDURES****AGENCY:** Merit Systems Protection Board.**ACTION:** Proposed rule.

**SUMMARY:** These proposed regulations published for public comment set forth the adjudicatory procedures of the Board. The purpose of the proposed regulations is to inform Federal agencies and employees as to the procedures for processing appeals and cases of original jurisdiction before the Board. Public comments are invited on the procedures.

**DATE:** Written comments will be accepted on or before May 22, 1979.

**ADDRESS:** Comments should be addressed to the Office of the Secretary, Merit Systems Protection Board, 1717 H Street, N.W., Washington, D.C. 20419.

**FOR FURTHER INFORMATION CONTACT:**

Alan Greenwald or Deborah House  
(202-653-7101).

**SUPPLEMENTARY INFORMATION:** Section 1205(g) of Title 5 of the United States Code authorizes the Merit Systems Protection Board to prescribe such regulations as may be necessary for the performance of its functions. Pursuant to that provision, on March 20, 1979 the Board approved the issuance of these proposed regulations to establish procedures necessary for the Board to carry out its adjudicatory duties as prescribed by the Civil Service Reform Act of 1978 (Pub. L. 95-454).

Public comment on these proposed regulations is both encouraged and welcomed. All comments received prior to May 22 will be considered in the formulation of final regulations. Comments received by the Board will be available for public inspection at the Board during normal business hours.

The promulgation of these proposed regulations is without effect on the interim regulations published in the **FEDERAL REGISTER** on January 19, 1979 (44 FR 3946) which will continue to be applied until their expiration on June 30, 1979 or upon the effective date of final regulations prior to June 30th.

Accordingly, it is proposed to establish 5 CFR Parts 1200-1202 in the manner set forth below.

**PROPOSED RULES**

Issued on March 20, 1979 at Washington, D.C.

RUTH T. PROKOP,  
*Chair, Merit Systems  
Protection Board.*

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**PART 1202—STATUTORY REVIEW BOARDS**

- 1202.1 Designation of chair of statutory review boards.

**AUTHORITY:** 5 U.S.C. 1205(g).

**SUBCHAPTER A: MERIT SYSTEMS PROTECTION BOARD****PART 1200—BOARD ORGANIZATION****Subpart A—General****§ 1200.1 The Board.**

The Merit Systems Protection Board ("the Board") is composed of three Members who are appointed by the President with the advice and consent of the Senate, and whose terms are for a period of seven years.

**§ 1200.2 The Chair; Vice Chair.**

One of the Members of the Board shall be designated from time to time by the President, with the advice and consent of the Senate, to serve as the Chair and chief executive and administrative officer of the Board. From time to time the President shall also designate one of the Members of the Board to serve as Vice Chair. In the absence or disability of the Chair, or when the Office of Chair is vacant, the Vice Chair shall perform the functions vested in the Chair. During the absence or disability of both the Chair and Vice Chair, or when their offices are vacant, the remaining Board Member shall perform the functions vested in the Chair.

**Subpart B—Offices of the Board [Reserved]****PART 1201—PRACTICE AND PROCEDURE****Subpart A—Jurisdiction and Definitions****GENERAL****§ 1201.1 Scope.**

The Board exercises two types of jurisdiction, original and appellate.

**§ 1201.2 Original jurisdiction: definition and application.**

The Act confers upon the Board original jurisdiction over: (a) actions brought by the Special Counsel (5

U.S.C. 1206(c)(1)(B) (g)(1), (h) and 1207(d)); (b) requests for stays of certain personnel actions (5 U.S.C. 1208); (c) actions against administrative law judges (5 U.S.C. 7521); and (d) requests for informal hearings in cases of removal from the Senior Executive Service (5 U.S.C. 3592).

**§ 1201.3 Appellate jurisdiction: definition and application.**

(a) The Board has appellate jurisdiction over cases specified in the Act where there have been prior actions or proceedings within an agency. In addition to the original jurisdiction described in § 1201.2, the Act confers upon the Board appellate jurisdiction over: (1) actions based upon removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less (5 U.S.C. 7513(d)); (2) actions otherwise appealable to the Board and involving an allegation of discrimination (5 U.S.C. 7702); (3) certain action relating to the Senior Executive Service (5 U.S.C. 7543(d); and 413(j) of Pub. L. 95-454); (4) actions involving reinstatement of preference eligibles (38 U.S.C. 2023); (5) removal or reduction in grade of competitive or preference eligible employees (5 U.S.C. 4303(e)); (6) denial of grade step increases (5 U.S.C. 5335(c)); and (7) those actions for which jurisdiction may be properly granted by regulations of the Office of Personnel Management (OPM).

(b) The Board may not hear matters under sections 4303 and 7512 where the aggrieved employee has elected to utilize a negotiated grievance procedure rather than the appellate procedures of section 7701. This election does not, however, prejudice the right of the employee to request review pursuant to section 7702 of any final decision otherwise appealable to the Board involving discrimination. (5 U.S.C. 7121 (d) and (e)).

**§ 1201.4 General definitions.**

(a) *Presiding official:* This term means any person designated by the Board to preside over any hearing or to make a decision on the record under this chapter, including: a hearing officer, an administrative law judge, the Board, or any of the Members of the Board.

(b) *The Act:* This term means the Civil Service Reform Act of 1978 (Pub. L. 95-454).

(c) *Pleadings:* This term refers generally to briefs, motions, petitions, and the like.

(d) *Appropriate field office:* The appropriate field office is that office listed in Appendix II in the area where the appellant's duty station was located when the agency action was taken.

**Subpart B—Hearing Procedures for Appellate Cases****GENERAL****§ 1201.11 Scope and policy.**

The rules in this subpart apply to appellate proceedings of the Board. These rules also apply to original jurisdiction proceedings of the Board except as otherwise provided. It is the policy of the Board that these rules shall be applied in a manner which expedites the processing of each case, but with due regard to the right of all parties.

**§ 1201.12 Suspension, revocation, amendment or waiver of rules.**

Under 5 U.S.C. 1205(g), the Board, acting on its own motion or on petition, may, revoke, amend, or waive in whole or in part, any of these rules as they apply generally to all cases. The Board may take such action on its own motion or petition. *Provided however,* that a presiding official may waive a rule for an individual case for good cause shown.

**PETITIONS FOR REVIEW OF AGENCY ACTION, PLEADINGS****§ 1201.21 Notice of rights to appeal.**

At the time an agency serves a decision notice on an individual in any matter falling within the appellant jurisdiction of the Board, it shall provide that individual with the following:

(a) Notice of the time limits for appealing to the Board under these regulations and the address of the appropriate Merit Systems Protection Board field office for filing such an appeal;

(b) Access to a copy of the Board regulations; and

(c) A copy of the appropriate form for filing an appeal as contained in Appendix II to these regulations.

**§ 1201.22 Filing of petition for appeal, response.**

(a) *Place of filing:* Petitions for appeal to the Board shall be filed at the appropriate Board field office.

(b) *Time of filing:* The petition shall be filed in the designated place no later than twenty calendar days after the effective date of the agency action complained of, or the appellant's receipt of the decision notice of the appealable action, whichever is later. Petitions received from outside of the contiguous 48 states, however, shall be deemed timely filed if received within thirty days after appellant's receipt of notice of an appealable action or the effective date of the action, whichever is later. The agency shall file the record of the agency proceeding and such responsive pleadings, and other documentation as may be required to adjudicate the case fairly and completely within 5 work days of the re-



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ceipt of the petition for appeal by the agency. Failure of the agency to provide responses as required by this section may result in the application of sanctions by the presiding official as set forth in § 1201.43. For purposes of this section, filing shall mean receipt of the document by the field office.

## § 1201.23 Computation of time.

In computing the time for filing pleadings, the day of the event, action, or failure to act, from which the designated time period begins to run shall not be counted. The last day of the period so computed shall be counted unless it is a Saturday, Sunday, or Federal legal holiday, in which case the time period shall include the next day which is not a Saturday, Sunday, or Federal legal holiday. When the time period prescribed or allowed under these regulations or by order of the presiding official is less than seven (7) days, the time computation shall exclude intervening Saturdays, Sundays and Federal legal holidays. When these regulations require the filing of any petition for appeal or review, such petition must be received at the field office before the close of business of the last day of the time limit for such filing.

## § 1201.24 Content of petitions, request for hearing.

(a) *Petitions:*

(1) All petitions shall contain the following information and be signed by the appellant or his/her representative:

- (i) Name of the agency involved;
- (ii) Date of the agency decision notice and the effective date of the action;
- (iii) The action taken by the agency;
- (iv) A request for hearing if so desired;
- (v) A statement setting forth with particularity the reasons why the appellant believes the action of the agency to be wrong and the evidence for these conclusions including the identification of any regulations or laws alleged to have been violated and the parties involved;
- (vi) A statement of the action which appellant would like the presiding official to order; and
- (vii) A designation of appellant's representative (if any).

A failure to raise a claim or defense in the petition shall not bar the raising of that claim or defense at a later date unless to do so would prejudice the rights of the other parties or unduly delay the proceedings.

(b) *Use of form:*

Completion of the form in Appendix II to these regulations shall constitute compliance with subsection (a) and § 1201.31, if a representative is designated in the form.

(c) *Request for hearing:*

(1) An appellant under U.S.C. 7701 is entitled to a hearing. The appellant may, however, choose to have the presiding official's determination made on the written record.

(2) An agency may request a hearing or the presiding official may hold one on his/her own motion.

## § 201.25 Number of pleadings: proof of service.

(a) *Number:* Two copies of all pleadings and attachments must be filed with the field office. Pleadings must be signed by the submitting party and must be served on all parties.

(b) *Service:* Service on parties or their representatives can be made either by mail or personal delivery.

(1) *Mail:* Service by mail is accomplished by mailing copies to all parties or their representatives at the address provided by appellant on his/her petition or by the agency in its decision notice. Copies must be deposited in a public United States Postal Service mailbox and must contain a Certificate of Service.

(2) *Personal delivery:* Service by personal delivery is accomplished by delivering the pleading to the business office or home of the person to whom it is addressed and leaving it with a responsible person at that address.

(3) *Certificate of Service:* An acceptable form for the Certificate of Service is set forth as part of the form printed as the Appendix to these regulations.

## § 1201.26 Class appeals.

(a) *Prerequisites.* One or more appellants may file an appeal as representative parties on behalf of all appellants only if: (1) the class is so numerous that joinder of all appellants is impractical; (2) there are questions of law or fact common to the class; (3) claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will inadequately protect the interest of the class.

(b) *Class Appeal Maintainable.* An appeal may be maintained as a class appeal if the prerequisites of subsection (a) are satisfied and in addition: (1) the presiding official finds the questions of law or fact common to members of the class are predominant over any questions affecting only individual members; and (2) that a class appeal is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(i) The interest of the members of the class in individually controlling the prosecution of separate appeal;

(ii) The extent and nature of any appeals concerning the controversy al-

ready commenced by members of the class;

(iii) The desirability or undesirability of concentrating the appeals in the office of the particular presiding official;

(iv) Difficulties likely to be encountered in management of a class appeal.

(c) *Procedure.* (1) Within thirty (30) days after the commencement of a class appeal the presiding official shall determine by order whether it is to be so maintained. An order under this subsection may be conditioned and may be altered or amended before the decision on the merits.

(2) The presiding official shall direct the agency to identify all members of the class and provide notice to each class member advising him/her that: (i) the presiding official will remove him/her from the class if he/she so requests by a specified date; (ii) a decision favorable or not will include all members who do not request exclusion; and (iii) any member of the class who does not request exclusion may appear in the proceeding.

(3) Decisions on class appeals shall describe particular appellants which the presiding official finds to be members of the class.

(4) The class appeal may be brought or maintained with respect to particular issues or a class may be divided into subclasses with each subclass treated as a class.

(5) Each member of the class shall be notified of any hearing in the class appeal.

(6) Class appeals shall not be dismissed or compromised without the approval of the presiding official and notice of the proposed dismissal or compromise shall be given to all members of the class.

## PARTIES, PRACTITIONERS, WITNESSES

## § 1201.31 Representation.

(a) All parties to an appeal may be represented in any matter relating to the appeal. The parties shall designate their representatives, if any, in the petition for appeal or responsive pleading. Any subsequent changes in representatives shall also be in writing and served on all other parties.

(b) A party may choose anyone he/she wishes to serve as his/her representative so long as the person is willing and able to serve. However, the other party or parties may challenge the representative on the grounds of conflict of interest. This challenge must be made by motion to the presiding official within seven (7) calendar days after receipt of the notice of designation, and shall be ruled upon prior to consideration of the case on the merits. These procedures apply equally to original and subsequent designations of representatives. In the event that the selected representative is dis-



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qualified, the party affected shall be given adequate time to obtain another representative.

(c) The presiding official, on his/her own motion, may disqualify a party's representative on the same grounds as described above.

**§ 1201.32 Witnesses: right to representation and exclusion.**

(a) Witnesses shall have the right to representation when testifying.

(b) A party may request by motion that a non-party witness be excluded from the hearing room to avoid prejudicing subsequent testimony or where the witness' presence may have a prejudicial chilling effect on the testimony of any other witness.

**§ 1201.33 Federal witnesses.**

Every Federal agency shall make its employees available to furnish sworn statements or to appear as witnesses at the hearing when requested by the presiding official. When making such statements or testimony, witnesses shall be in official duty status as provided under Executive Order 12107.

**§ 1201.34 Intervenors.**

(a) *Intervention by OPM:* Pursuant to 5 U.S.C. § 7701(d)(1), the Director of OPM ("the Director") may intervene as a matter of right if:

(1) The interpretation or application of any civil service law, rule or regulation, under the jurisdiction of OPM is at issue; and

(2) The Director is of the opinion that an erroneous decision would have a substantial impact on any Civil Service law, rule, or regulation under the jurisdiction of the Office. Such intervention shall be made at the earliest practicable time in order not to prejudice the parties or unduly delay the proceeding.

(b) *Intervention of the Special Counsel:* Pursuant to 5 U.S.C. 1206(i), the Special Counsel may intervene as a matter of right in any proceeding before the Board. Such intervention shall be made at the earliest practicable time in order not to prejudice the parties or unduly delay the proceedings.

(c) *Permissive intervention:*

(1) In accordance with the following rules, any person whose interests may be directly affected by the outcome of a proceeding before the Board may petition the presiding official for permission to intervene.

(i) The petitions shall be served on all parties and shall clearly set forth the reasons why the petitioners should be permitted to intervene.

(ii) It shall be solely within the discretion of the presiding official to grant or deny the petition. An order to permit intervention shall specify the

issue(s) regarding which the intervenor may participate.

(2) A permissive intervenor in a proceeding shall have all the rights and obligations of the other parties except that:

(i) The scope of participation may be limited to certain issues;

(ii) The intervenor shall not have an independent right to a hearing; and

(iii) The intervenor shall not have the right to appeal the decision of the presiding official, *provided however*, that the intervenor may petition the Board to participate if a petition for review is filed.

**§ 1201.35 Substitution.**

If a party to an appeal dies or is otherwise unable to pursue the action, the appeal shall be processed to completion upon substitution of the successor-in-interest to the rights of the party, *provided* the interests of the original party have not been rendered moot.

**§ 1201.36 Consolidation or joinder.**

(a) If the presiding official believes that consolidation or joinder of cases would result in more expeditious processing of the appeals and would not adversely affect any party, he/she may, after giving the parties opportunity to object, consolidate the cases and hear and decide them concurrently. In so doing the presiding official may:

(1) Join appeals filed by two or more appellants; or

(2) Consolidate two or more appeals filed by the same appellant.

**§ 1201.37 Fees.**

(a) *Attorney fees:* Except as provided in subparagraph (1) of this section, the presiding official may require payment by the agency involved of reasonable attorney fees incurred by an appellant if he/she is the prevailing party and payment by the agency is warranted in the interest of justice, including any cases in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(1) If an appellant is the prevailing party and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1), the payment of attorney fees shall be in accordance with the standards prescribed under 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(2) Requests for payment of attorney fees shall be made by motion within seven days of the filing of an initial decision in favor of the appellant. The agency may file a responsive pleading within seven days of receipt of appellant's motion. The ruling of

the presiding official shall be made an addendum to the initial decision.

(b) *Witness fees:*

(1) *Federal employees:* Employees of any Federal agency testifying in any proceeding before the Board or making a statement for the record shall be in official duty status and shall not receive additional witness fees. Payment of travel and per diem expenses shall be governed by applicable regulations of OPM and the Federal Travel Regulations of the General Services Administration.

(2) *Other witnesses:* Witnesses who are not covered by subsection (1) of this section are entitled to the same witness fees as those paid subpoenaed witnesses under 28 U.S.C. 1821.

(3) *Payment of witness fees:* Witness fees shall be paid by the party requesting the presence of the witness and shall be tendered to the witness at the time the subpoena is served, or, where the witness appears voluntarily, at the time of appearance.

**PRESIDING OFFICIALS**

**§ 1201.41 Authority of presiding official.**

Presiding officials shall conduct fair and impartial hearings and take all necessary action to avoid delay in the disposition of all proceedings. They shall have all powers necessary to that end unless otherwise limited by statute or regulation, including the authority to:

(a) Administer oaths and affirmations;

(b) Issue subpoenas in accordance with § 1201.81 of this Part;

(c) Rule upon offers of proof and receive relevant evidence;

(d) Rule upon the institution of discovery procedures as appropriate in accordance with § 1201.73;

(e) Regulate the course of the hearing, maintain decorum, and exclude from the hearing any person engaged in contemptuous conduct or otherwise disrupting the proceeding, any witness whose presence may adversely affect the testimony of any other witness, or any witness who may testify in the future;

(f) Consider and rule upon all procedural and other appropriate motions, witness and exhibit lists, proposed findings;

(g) Require the filing of memoranda of law and the presentation of oral argument with respect to any question of law;

(h) Order the production of evidence relevant to the issues to be resolved in the hearing;

(i) Impose sanctions as provided under § 1201.43 of this Part;

(j) File initial decisions; and

(k) To take any other action authorized by these rules.

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## § 1201.42 Disqualification of presiding official.

(a) In the event that a presiding official deems himself/herself disqualified he/she shall withdraw from the case stating on the record the reasons therefor and immediately notify the Board of the withdrawal.

(b) Any party may request the presiding official to withdraw on the grounds of personal bias or other disqualification.

(1) The party seeking disqualification shall file with the presiding official an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. Such affidavit shall be filed not later than five days before the commencement of the hearing.

(2) The presiding official may file a response to the affidavit, and if he/she believes himself/herself not disqualified, shall so rule and proceed with the hearing.

(3) The person seeking disqualification may except to a ruling of non-disqualification and, in that event, shall do so within three days after receipt of the ruling is made. Unless exception is taken to the ruling at this time, the right to request withdrawal of the presiding official shall be deemed to have been waived.

(4) If exception to the ruling is taken, the presiding official shall immediately certify the question, and transmit the record to the Board. The hearing shall be suspended pending a ruling on the question by the Board.

(5) The Board may rule on the question without hearing, or it may require testimony or argument on the issues raised.

(6) The affidavit, response, testimony or argument thereon, and the Board's decision shall be part of the record in the case.

## § 1201.43 Sanctions.

The presiding official may impose any necessary sanctions upon the parties as will serve the ends of justice including but not limited to:

(a) *Failure to comply with an order:* In the absence of good cause shown, if a party fails to comply with an order, including an order for the taking of a deposition; the production of evidence within the party's control; a request for admission; and production of a witness, the presiding official may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) Prohibit the party failing to comply with such order from introducing evidence of, or otherwise relying upon testimony relating to, the information sought;

(3) Permit the requesting party to introduce secondary evidence of the information sought; and

(4) Strike any part of the pleadings or other submission of the party failing to comply with such request pertaining thereto.

(b) *Failure to prosecute:* If a party fails to prosecute his/her case or defend an appeal the presiding official may dismiss the action with prejudice or rule for the appellant.

(c) *Failure to make timely filing:* The presiding official may refuse to consider any motion or other action which is not filed in a timely fashion in compliance with this part.

(d) *Failure to make service:* The presiding official may refuse to consider any motion or other action which is not properly served on all parties. A failure to meet technical requirements of service under this part will not affect the rights of any parties if service was actually completed and the rights of the party being served were not prejudiced.

## HEARINGS

## § 1201.51 Scheduling the hearing.

The notice of initial hearing shall fix the date, time and place of the hearing. The hearing shall be scheduled not earlier than ten calendar days after the date of the notice, *provided however*, that this requirement may be waived upon agreement of the parties. All parties shall attend the hearings for the purpose of fully developing the record. The agency, upon request of the presiding official, shall provide adequate hearing facilities. Motions for postponement by either party shall be made in writing and shall be granted only upon a verified showing of good cause.

## § 1201.52 Public hearings.

Hearing shall be public, *provided however*, that the presiding official may order part of a hearing closed, where to do so would be in the best interest of the appellant, a witness, the public or other affected persons. The order shall set forth the reasons for the hearing officer's decision to close a hearing, and any objections thereto, shall be made a part of the record.

## § 1201.53 Transcript.

(a) *Preparation:* Every hearing shall be recorded verbatim under the supervision of the presiding official and shall be the sole official transcript of the proceeding. A copy of the transcript shall be made available to each party; intervenors and other interested parties shall be furnished a copy at their own cost.

(b) *Corrections:* Corrections of the official transcript will be permitted upon motion. Motions for correction must be submitted within ten days of the issuance of the transcript. Corrections of the official transcript will be

permitted only when errors of substance are involved and only upon approval of the presiding official.

## § 1201.54 Official record.

The transcript of testimony and exhibits, together with all papers and motions filed in the proceeding shall constitute the exclusive and official record.

## § 1201.55 Motions.

(a) All motions shall be filed with and decided by the presiding official when such decision is within his/her authority.

(b) All motions shall be in writing, shall state the particular order desired and the basis therefor, and shall be served on all parties. The presiding official may waive the requirement for a written submission if it is made during the course of the hearing.

(c) Motions for extension of time will be granted only for good cause shown.

## § 1201.56 Burden and degree of proof.

(a) *Burden of proof:*

(1) Pursuant to Section 7701(c)(2) of the Act, the agency's decision shall not be sustained by the presiding official if the employee can demonstrate that the decision of the agency:

(i) Was based upon harmful error in the application of the agency's procedures in arriving at the decision;

(ii) Was based upon a prohibited personnel practice as set forth in Section 2302(b) of the Act; or

(iii) Was not otherwise in accordance with law or applicable OPM regulations.

(b) In the absence of the appellant's ability to demonstrate the above, the decision of the agency must be sustained by the Board pursuant to Section 7701(b)(1) of the Act if:

(1) It is brought under § 4303 of the Act and can be supported by substantial evidence, or

(2) It is any other type of case and is supported by a preponderance of the evidence.

(c) For purposes of this section, the following definitions shall apply:

(1) *Substantial Evidence:* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true.

(2) *Preponderance of the Evidence:* That degree of relevant evidence which a reasonable mind might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

(3) *Harmful error:* Error by the agency in the application of its procedures which, in the absence or cure of the error, would have caused the agency to reach a conclusion different

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than the one reached. The burden is upon the appellant to show that the harmful error caused substantial harm or prejudice to his/her rights.

(d) *Moving forward.*

In cases where action has been taken against an employee by the agency, the agency shall present its case first. The appellant may then present evidence, *provided however*, that the appellant shall have the burden of proof as to issues of jurisdiction and timeliness of filing.

§ 1201.57 Closing the record.

(a) When there is a hearing, the record shall be closed at the conclusion of the hearing except that, when the presiding official allows the parties to submit argument or briefs or documents previously identified for introduction into evidence, the record shall be left open for such time as the presiding official grants for that purpose.

(b) If the appellant waives a hearing, the record shall be closed on the date set by the presiding official as the final date for the receipt of representations of the parties to the matter.

(c) Once the record is closed, no additional evidence or argument shall be accepted into the record except upon a showing that new and material evidence which was not readily available prior to the closing of the record becomes available. *Provided however*, that the presiding official shall make part of the record any motions for attorneys fees and supporting documentation.

## EVIDENCE

§ 1201.61 Service of documents.

All documents referred to in the pleadings shall be served upon all parties to the proceeding in the same manner as pleadings, to the extent practicable. Exception to this rule shall be made for medical evidence which a prudent physician would hesitate to release to a patient. Such evidence shall be made available only to a duly licensed physician designated by the appellant or his/her representative.

§ 1201.62 Admissibility.

(a) Evidence or testimony may be excluded from consideration by the presiding official if it is unduly repetitious, irrelevant, or immaterial.

(b) All evidence and testimony or, where appropriate a description thereof, offered in the hearing, but excluded by the presiding official, shall be made a part of the record.

§ 1201.63 Production of evidence by order of presiding official.

At any stage of a hearing, the presiding official may request further evi-

dence upon an issue and require its submission.

§ 1201.64 Production of statements.

After a witness has given direct testimony in a hearing, any party may move for production of a statement of such witness, or part thereof relevant to his/her direct testimony, which has been reduced to writing and signed by the witness and is in the possession of the party calling the witness. If the party decline to furnish the statement, the testimony of the witness pertaining to the requested statement may be stricken.

§ 1201.65 Admission of facts and genuineness of documents.

(a) The presiding official may order any party to respond to the requests for the admission of the genuineness of any relevant documents identified within the request or the truth of any relevant matters of fact or law as set forth in the request.

(b) Within the time period prescribed by the presiding official, the party on whom the request is served must serve upon all parties;

(1) A sworn statement specifically denying or admitting or expressing a lack of knowledge regarding the specific matters on which an admission is requested.

(2) An objection to the request in whole or in part on the ground that the matters contained therein are privileged, irrelevant or otherwise improper.

§ 1201.66 Stipulations.

The parties may stipulate as to any matter of fact or law except the jurisdiction of the Board. Such a stipulation will satisfy a party's burden of proving the alleged fact.

§ 1201.67 Official notice.

The presiding official on his/her own, or on motion of a party, may take official notice of matters of common knowledge or certain verification, *provided however*, that the parties must be advised and given the opportunity to oppose the propriety of taking such notice, and any notice must be noted in the record. Official notice satisfies a party's burden of proving the fact noticed.

## DISCOVERY

§ 1201.71 Statement of purpose.

It is the intent of the Board that all proceedings will be conducted as expeditiously as possible with due regard to the rights of the parties. With regard to discovery these two considerations require that a careful balance be established between avoiding unproductive delay in adjudication and obtaining that information essential to per-

fect the record. Accordingly, the discretion of the presiding official must be carefully exercised in determining the necessity for discovery.

§ 1201.72 Scope.

Any person may be examined regarding any non-privileged matter, which is relevant to the hearing issue, including the existence, description, nature, custody, condition and location of documents or other tangible things and the identity and location of persons having knowledge of relevant facts.

§ 1201.73 Orders for discovery.

(a) *Request for order.* Motions for orders to take deposition or to respond to written interrogatories under 5 U.S.C. § 1205(b)(2)(B) shall be submitted to the presiding official.

(b) *Ruling.* Where the presiding official does not have the authority to issue the requested order, the motion shall be transmitted with a recommendation for decision to the officer on duty. This officer shall be either an administrative law judge or a Member of the Board, with authority to grant or deny such requests, and shall promptly rule on the request. Where the presiding official has the authority to do so, he/she shall rule directly on the request. This order shall include, where appropriate:

(1) Provision for notice to the party to be orally deposed as to the time and place of such deposition;

(2) Placement of any limitations on the conduct of the proceeding or the subject matter necessary to protect any party or deponent from expense, embarrassment or oppression;

(3) Placement of any limitations upon the time for deposition; submission of or answer to written interrogatories; or production of evidence; and

(4) Any other restrictions upon the discovery procedures as determined by the presiding official.

§ 1201.74 Taking of depositions.

Depositions may be taken before a presiding official, or a notary public not interested in the outcome of the proceeding.

§ 1201.75 Rules governing discovery procedures.

Because discovery in matters before the Board is intended to be of a simplified nature, procedures are not set forth in great detail. To the extent, however, that the nature of discovery in a case required further guidance, the presiding official and parties may refer to the Federal Rules of Civil Procedure. Such rules should be interpreted as being instructive rather than controlling.

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## SUBPENAS

## § 1201.81 Motions for subpoenas.

(a) *Motions for subpoena:* Motions for the issuance of subpoenas requiring the attendance and testimony of witnesses or the production of documents or other evidence under 5 U.S.C. 1205(b)(2)(A) shall be submitted to the presiding official.

(b) *Form:* Motions for a subpoena shall be submitted in writing, shall be served on all parties, and shall specify with particularity the books, papers and documents desired and the facts expected to be proven thereby.

(c) *Rulings:* Where the presiding official does not have the authority to issue subpoenas, the motion shall be transmitted with a recommendation for decision to the officer on duty. Such officer, shall be either an administrative law judge or a Member of the Board, with authority to grant or deny such requests, and shall promptly rule on the request. Where the presiding official has the authority to do so, he/she shall rule directly on the request.

(d) All requests for subpoenas shall be supported by a showing of the general relevance and reasonable scope of the evidence sought.

## § 1201.82 Motions to quash.

Any person against whom a subpoena is directed may file a motion to quash or limit the subpoena, setting forth the reasons why the subpoena should not be complied with or why it should be limited in scope. This motion shall be filed with the presiding official and shall be processed, where appropriate, as set forth in subsection (c).

## § 1201.83 Service.

Service of subpoena may be made by a United States Marshall or Deputy Marshall, by Board personnel, or by any person who is not a party to the hearing and who is over 18 years of age.

## § 1201.84 Return of service.

The service of a subpoena by a person other than a United States Marshall or Deputy Marshall shall be attested to by the person making such service. The attesting affidavit shall state the date, time and method of making service.

## § 1201.85 Enforcement.

In the case of contumacy or failure to obey a subpoena issued, the Board, pursuant to 5 U.S.C. 1205(c), may request enforcement of the subpoena in the United States District Courts. Application for enforcement of the subpoena shall be made by the General Counsel of the Board.

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## INTERLOCUTORY APPEALS

## § 1201.91 Interlocutory appeals.

Because of the expedited nature of the proceedings, interlocutory appeals shall not be entertained by the Board unless specifically provided for by these regulations. Objection to any ruling of a presiding official shall be noted on the record and may be raised to the Board in a petition for review.

## EX PARTE COMMUNICATIONS

## § 1201.101 Definitions.

(a) *Ex parte communication:* Any written presentation made to the decision-making personnel of the Board during the course of a restricted proceeding in the absence of service on the parties to the proceeding or any oral presentation made during the course of a restricted proceeding in the absence of advance notice to the parties.

(b) *Restricted proceeding:* All adjudicative proceedings, from the time they are filed until the time they are no longer subject to review or reconsideration by the Board.

(c) *Interested persons:* Any person having a direct or indirect interest in the outcome of a restricted proceeding, including the following:

(1) Parties to the restricted proceeding.

(2) Any other person who might be aggrieved or adversely affected by the outcome of the restricted proceeding.

(3) Agents for persons who might be aggrieved or adversely affected by the outcome of the restricted proceeding, including attorneys and other representatives.

(d) *Decision-making Board personnel:* The term "decision-making personnel" includes any presiding official and his/her immediate staff or other Board employee who participates, or can reasonably be expected to participate, in the initial decision-making process on review or reconsideration.

## § 1201.102 Prohibition against ex parte communications.

No interested person shall, in a restricted proceeding, make or knowingly cause to be made, any ex parte communications to decision-making personnel which relate to the merits of any action or any facts or questions of law at issue.

## § 1201.103 Permissible ex parte communications.

The following ex parte communications shall not be considered to be ex parte communication prohibited by the provisions of this subpart:

(a) Any request for information which does not relate to the merits of an action or any facts or questions of law at issue; and

(b) Any communication from an agency of the Federal government involving classified security information.

## § 1201.104 Sanctions for prohibited ex parte communications.

(a) *Parties:* To the extent consistent with the interests of justice and the public, a party who has made an ex parte presentation may be required to show cause why his/her claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected.

(b) *Board Personnel:* Violations of the provisions of this subpart by Board personnel will be treated in accordance with the established Standards of Conduct.

(c) *Other persons:* Such sanctions as may be appropriate under the circumstances will be imposed upon other persons who violate the provisions of this subpart.

## FINAL DECISIONS

## § 1201.111 Initial decisions by presiding officials.

(a) The presiding official shall prepare an initial (or recommended) decision within 25 days of the closing of the record. Such initial decision shall be immediately transmitted to the Secretary of the Board, to the Director of OPM and to all parties to the appeal.

(b) Each initial decision shall contain:

(1) Findings of fact and conclusions, as well as the reasons or bases therefor, upon all the material issues of fact and law presented on the record;

(2) An order as to the final disposition of the case, including appropriate relief; and

(3) The date upon which the decision will become effective.

## § 1201.112 Jurisdiction of the presiding official.

The jurisdiction of the presiding official other than the Board shall cease after he/she has filed the initial decision, *provided however*, that he/she shall retain limited jurisdiction over the proceeding for the purpose of correcting the transcript and ruling on any request made by the appellant for attorney fees.

## § 1201.113 Finality of decision.

The initial decision of the presiding official shall become final 30 days after receipt.

(a) *Exceptions:* The initial decision shall not become final if any party files a petition for review or the Board reopens the case.

(b) *Petition for review denied:* Where all petitions for review are denied by the Board, the initial deci-

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sion shall become final on the date of the denial.

(c) *Petition for review granted or case reopened:* Where a petition for review is granted or the Board reopens a case the decision of the Board shall be the final decision.

**§ 1201.114 Exhaustion of administrative remedies.**

(a) *Petition for review denied:* Where all petitions for review have been denied, administrative remedies shall be deemed to have been exhausted on the date of denial.

(b) *Petition for review granted or case reopened:* Where a petition(s) for review has been granted or the case reopened, administrative remedies shall be deemed to have been exhausted on the date of issuance of the final decision of the Board.

(c) *Petition for review not filed, case not reopened:* Where on the 30th day after receipt of decision, no petition(s) for review has been filed and the Board has not reopened the case, administrative remedies shall be deemed to have been exhausted.

**§ 1201.115 Petitions for review: contents.**

The petitions for review shall contain exceptions to the decision of the presiding official. The basis for each exception shall be clearly set forth and shall include the laws, rules or regulations relied upon in support of the petition with specific reference to the record. The Board may grant a petition for review when the party requesting review submits written argument and supporting documentation tending to establish that:

(a) New and material evidence is available that despite due diligence was not available when the decision of the presiding official was issued; or

(b) The decision of the presiding official is based upon an erroneous interpretation of law, rule, or regulation, or a misapplication of established policy; or

(c) The decision of the presiding official is of a precedential nature involving new or unreviewed policy considerations that may have substantial impact on a civil service law, rule, regulation or a more Government-wide policy directive.

**§ 1201.116 Filing of petition.**

(a) *Who may file:* Any party to the proceeding (except for a permissive intervenor) and the Director of OPM may file a petition for review. Under 5 U.S.C. 7701(e)(2) the Director may request review of a case only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(b) *Time:* A petition for review of the initial decision of the presiding official must be filed within 30 days of receipt of the decision. The date of receipt of the decision shall be deemed to be the third calendar day following the date of issuance of that decision. The Board may extend the 30 day time limit for good cause shown.

(c) *Place:* A petition for review shall be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419.

**§ 1201.117 Board reopening and reconsideration of case.**

The Board may reopen and reconsider a decision of a presiding official on its own motion at any time, notwithstanding provisions of § 1201.114(c).

**§ 1201.118 Review or reopening of initial decision by Board.**

(a) In any case where the Board determines to reopen or review a case on its own motion, or on the basis of a petition, it shall inform the parties, and may:

- (1) Hear oral argument;
- (2) Require the filing of briefs;
- (3) Remand the proceedings to the presiding official to take further testimony or evidence or to make further findings or conclusions; or
- (4) Take any other action necessary for final disposition of the case.

(b) The Board may affirm, reverse, remand, modify or vacate the decision of the presiding official, in whole or in part, upon review or reconsideration. Where appropriate, the Board shall issue a final decision and order a date for compliance.

**Subpart C—Hearing Procedures for Original Jurisdiction Cases**

**ACTIONS BROUGHT BY THE SPECIAL COUNSEL**

**§ 1201.121 Compliance with hearing procedures under Subpart B.**

In cases where the Special Counsel, pursuant to statute, files a complaint or request with the Board, he/she shall comply as appropriate with the regulations set forth in subpart B, regarding hearing procedures, except as otherwise provided in this subpart.

**§ 1201.122 Special Counsel complaints.**

If the Special Counsel determines that any of the following actions should be taken, a written complaint setting forth with particularity the supporting facts and any alleged violations of law or regulation shall be filed in duplicate with the Office of the Secretary and served on all parties:

(a) Action to require agency to take corrective action as recommended by the Special Counsel (5 U.S.C. 1206(c)(1)(B)).

(b) Action to correct a pattern of prohibited personnel practices not otherwise appealable to the Board (5 U.S.C. 1206(h)).

(c) Action to discipline employee (5 U.S.C. 1207).

**§ 1201.123 Rights of employees.**

An employee against whom a complaint for disciplinary action has been presented shall have the right to:

(a) File an answer to the complaint along with affidavits and documentary evidence;

(b) be represented by an attorney or other representative;

(c) A hearing upon the record before the Board or an administrative law judge; and

(d) A written decision by the Board and the reasons therefor, issued at the earliest practicable date, including a copy of any final order imposing disciplinary action.

**§ 1201.124 Answer.**

(a) *Filing and default:* An answer to any complaint by the Special Counsel shall be filed with the Secretary of the Board within 30 days of receipt by the agency or employee. In the absence of good cause shown, failure to file an answer by an agency shall be deemed to constitute a waiver of the right to contest the allegations of the complaint. This failure shall authorize the administrative law judge or Board to find the facts alleged in the complaint to be true and to enter an initial decision.

(b) *Content:* The answer shall conform to the following:

(1) *Allegations of the complaint which are contested:* An answer shall contain, for those allegations of a complaint which are contested:

(i) A concise statement of the facts constituting each ground of defense and any documentary evidence in support thereof;

(ii) Specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a complaint not thus answered shall be deemed to have been admitted.

(c) *Allegations of the complaint which are admitted:* For those allegations which the respondent elects not to contest, the answer shall consist of statements of admissions to the truth of each allegation. Such portions of an answer shall constitute a waiver of hearings as to those facts alleged in the complaint, and together with the complaint will provide a record basis for decision.

**§ 1201.125 Final Orders of the Board.**

(a) In any action seeking correction of a prohibited personnel practice, after providing an opportunity for

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comment by the agency and OPM, the Board may order such corrective actions as it considers appropriate. (5 U.S.C. 1206(c)(1)(B)).

(b) In any action seeking correction of a pattern of prohibited personnel practices not otherwise appealable to the Board, the Board may order an agency or employee to take such corrective actions as the Board determines necessary. (5 U.S.C. 1206(h)).

(c) In any action to discipline an employee a final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000.00. (5 U.S.C. 1207).

(d) In any action seeking the withholding of federal funds pursuant to 5 U.S.C. 1508 where a state or local employee has engaged in prohibited political activities, the Board may order that federal funds to the affected state or local government be withheld.

#### § 1201.126 Request for stay.

The Special Counsel may request the Board or a Member of the Board to order a stay of any personnel action.

(a) *Content:* The request shall be signed by the Special Counsel or his/her representative and shall clearly set forth the following:

- (1) The names of the parties;
- (2) The agency and officials involved;
- (3) The nature of the action to be stayed;

(4) A concise statement of the facts upon which the Special Counsel has determined there are reasonable grounds to believe that the personnel action was taken or is to be taken as a result of a prohibited personnel practice;

(5) The laws or regulations alleged to have been violated or which will be violated if the stay is not issued; and

(6) A proposed order to be issued by the Board.

(b) *Place of filing:* A petition for stay shall be filed in duplicate with the Office of the Secretary and shall be served on all parties in accordance with these rules.

(c) *Action on the request for stay:*

(1) The Board or a Member of the Board shall order a stay for 15 days unless it is determined to be not appropriate under the facts and circumstances presented. Unless denied a request for an initial 15 day stay shall be granted within three calendar days after the date of request. The stay may be extended by the Board or a Member of the Board for up to 30 additional days upon request by the Special Counsel.

(2) Upon 5 days' notice to the Special Counsel and the agency of the opportunity for oral or written comment

as the Board deems appropriate, the Board pursuant to 5 U.S.C. 1208(c) may extend a stay for any period it deems appropriate.

(3) At any time, the Board or where appropriate, a Member of the Board, may request the Special Counsel to appear and present further information or explanation on a petition for a stay.

#### § 1201.127 Special Counsel actions heard by Administrative Law Judge.

(a) Where an action brought by the Special Counsel is heard by an administrative law judge at the direction of the Board, the decision shall be a recommended decision to the Board in accordance with 5 U.S.C. 557.

(b) Any exceptions to the recommended decision of the administrative law judge shall be filed with the Board within 20 days.

#### § 1201.128 Administrative Appeal.

No administrative appeal lies from an order of the Board.

#### ACTIONS AGAINST ADMINISTRATIVE LAW JUDGES

##### § 1201.131 Procedures.

Where, pursuant to 5 U.S.C. 7521, an agency proposed to take action against an administrative law judge appointed under 5 U.S.C. 3105, the hearing shall comply with the procedures established under subpart B, except as otherwise provided.

##### § 1201.132 Presiding official.

(a) The presiding official in all cases brought under this section shall be the Board or an administrative law judge;

(b) Where the presiding official is an administrative law judge, the decision shall be a recommended decision to the Board under 5 U.S.C. 557.

(c) Any exceptions to the decision of the administrative law judge shall be filed with the Board within 20 days.

##### § 1201.133 Board jurisdiction.

The proposed agency actions which may be heard before the Board under this provisions are limited to:

- (a) A removal;
- (b) A suspension;
- (c) A reduction in grade;
- (d) A reduction in pay; and
- (e) A furlough of 30 days or less.

##### § 1201.134 Filing of complaint.

Any action against an administrative law judge shall be initiated by the filing of a complaint by the agency setting forth with particularity the facts in support of the proposed action.

##### § 1201.135 Procedure.

The administrative law judge against whom the complaint is filed shall file

an answer to the complaint in compliance with § 1201.124 of this subpart.

##### § 1201.136 Showing required.

Proposed agency actions under this section are sustainable only for good cause shown.

#### REMOVAL FROM THE SENIOR EXECUTIVE SERVICE

##### § 1201.14 Entitlement to hearing.

In the case of removal of a career appointee from the Senior Executive Service to a civil service position outside the Senior Executive Service pursuant to 5 U.S.C. 3592, when such action is based on less than fully successful performance as determined under subchapter II of Chapter 43 of title 5, United States Code, the career appointee shall, at least 15 days before the effective date of the removal, be entitled, upon request, to an informal hearing before an official appointed by the Board.

##### § 1201.142 Hearing procedures.

In an informal hearing before the Board or its designee as provided for in this section, the appointee may appear and present arguments on the record but shall not be entitled to any other procedural rights.

##### § 1201.143 Right to appeal.

No right to appeal from this action shall be available under 5 U.S.C. § 7701, nor shall the removal action be delayed as a result of this hearing.

#### Subpart D—Procedures for Cases Involving Allegations of Discrimination

##### § 1201.151 Scope and policy.

(a) *Scope.*

(1) The rules in this subpart implement 5 U.S.C. 7702. They apply to actions otherwise appealable to the Board where an employee or applicant for employment alleges that the basis for the action, in whole or in part, was prohibited discrimination.

(2) "Prohibited discrimination" as used in this subpart means that discrimination prohibited by:

- (i) Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16c);
- (ii) Section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(iii) Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791);

(iv) Sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631a); or

(v) Any rule, regulation or policy directive prescribed under any provision of law described in (i) through (iv) above.

(b) *Policy.* It is the policy of the Board to make every effort to fairly and thoroughly adjudicate issues



raised under this subpart in the course of an action brought before the Board. Particular emphasis is to be placed on providing appellants the opportunity to raise allegations of discrimination in the appeals process and developing the evidentiary record as to the veracity thereof.

**§ 1201.152 Compliance with procedures under subpart B.**

All actions involving allegations of prohibited discrimination shall comply with the provisions of subpart B of these regulations except as otherwise provided in this subpart.

**§ 1201.153 Petition.**

(a) *Content:* A petition for appeal raising issues of prohibited discrimination under this subpart shall comply with the provisions of § 1201.24 with the following exceptions:

(1) The petition shall state with particularity the basis for the allegation of discrimination. This statement shall not simply allege that there was discrimination, but must, by examples or otherwise, indicate how the appellant was discriminated against; and

(2) The petition shall state whether the appellant has filed a discrimination complaint with his/her agency or any other agency, the date of filing such a complaint and the action (if any) taken.

(b) *Use of Form:* Completion of the form in Appendix II to these regulations, including Questions 19A and B, shall constitute compliance with the provisions in (a) above.

(c) *Time for Filing:* A petition raising issues of prohibited discrimination shall be filed in accordance with the following schedule:

(1) Where the appellant has filed a complaint of discrimination or grievance with the agency, a petition must be filed within 20 days following agency resolution or final decision on the discrimination issue.

(2) Where the appellant has filed a complaint of discrimination or grievance with the agency, but the agency has taken no action on the complaint within 120 days, a petition may be filed anytime after the lapse of the 120 day period.

(3) Where the appellant has been subjected to an action appealable to the Board, he/she must either file a complaint of discrimination with the agency or appeal to the Board within the time prescribed by § 1201.22(b).

**§ 1201.154 Allegations of discrimination not raised in petition.**

(1) *Timeliness:* Failure of an appellant to raise an allegation of prohibited discrimination in a petition for appeal shall not be a basis for exclusion of the issue(s) from consideration. Exclusion of the issue from considera-

tion shall be made only upon a showing by the agency that to consider the issue(s) would prejudice the rights of the agency and unduly delay the proceedings.

(2) *Effect:* Where an appellant raises an allegation of prohibited discrimination in the course of proceeding which was not raised before the agency prior to appeal, the presiding official shall use his/her authority under § 1201.41 of these regulations and particularly subsection (h) of that section, to develop the record sufficiently to make a determination on the issue. The presiding official is not required to remand the issue to the agency for determination *provided however*, that he/she may do so upon written agreement of both parties submitted for the record. If the issue is so remanded the appeal shall be dismissed without prejudice.

(3) *Agency answer:* Where an appellant alleges prohibited discrimination during the course of the proceeding, the agency shall be given a reasonable opportunity to refute the allegation through a responsive pleading, testimony or production of documents or as otherwise permitted by the presiding official.

**§ 1201.155 Time for processing appeals involving discrimination.**

(a) *Issue raised in petition:* Where an appellant alleges prohibited discrimination in the petition for appeal, the Board shall decide both the issue of discrimination and the appealable action within 120 days of the filing of the appeal.

(b) *Issue not raised in petition:* Where an appellant has not alleged prohibited discrimination in the petition for appeal, but raises the issue subsequently in the proceeding, the Board shall, decide both the issue of discrimination and the appealable action within 120 days after the issue is raised.

**§ 1201.156 Presiding official.**

An appeal from a final decision or order under 5 U.S.C. 7121 or 7122 by an arbitrator or the Authority shall be heard by an administrative law judge or the Board.

**§ 1201.157 Final decision.**

Any final decision of the Board shall notify the appellant of his/her rights to petition the Equal Employment Opportunity Commission to consider the Board's decision or to file a civil action in an appropriate United States District Court.

**§ 1201.158 Action by the Commission.**

(a) In cases where an appellant petitions the Commission for consideration under 5 U.S.C. 7701(b)(2) the Commission shall determine, within 30

days after the date of petition, whether to consider the Board's decision.

(b) Where the Commission determines to consider the Board's decision, within 60 days after making such determination, it shall complete its consideration and either—

(1) Concur in the decision of the Board; or

(2) Issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law—

(i) The decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive relating to prohibited discrimination; or

(ii) The decision involving such provision is not supported by the evidence in the record as a whole.

(iii) *Transmittal of record:* The Board shall transmit a copy of its record to the Commission upon request.

(iv) *Development of additional evidence:* When requested by the Commission, the Board shall develop additional evidence necessary to supplement the record.

**§ 1201.159 Board action on the Commission decision.**

(a) Within 30 days after receipt of a decision of the Commission issued under § 1201.155, the Board shall consider the decision and—

(1) Concur and adopt in whole the decision of the Commission; or

(2) To the extent that the Board finds that, as a matter of law, (i) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation, policy directive, or (ii) the Commission decision involving such provision is not supported by the evidence in the record as a whole—

(A) Reaffirm the decision of the Board; or

(B) Reaffirm the decision of the Board with such revisions as it determines appropriate.

**SPECIAL PANEL**

**§ 1201.160 Referral of case to special panel.**

If the Board reaffirms its decision, with or without modification, under § 1201.156, the matter shall be immediately certified to the special panel established pursuant to 5 U.S.C. 7702(d). Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and Federal holidays), transmit to the special panel the administrative record in the proceeding, including—

(a) The factual record compiled under this section;



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(b) The decisions issued by the Board and the Commission under this section; and

(c) Any transcript of oral arguments made, or legal brief filed, before the Board or the Commission.

#### § 1201.161 Action by special panel.

The special panel, convened pursuant to 5 U.S.C. 7702(d)(2)(A), shall review the administrative record transmitted to it, and, on the basis of the record, issue a final decision within 45 days of certification of a matter to it under § 1201.159. The Board shall, upon receipt of the decision of the special panel, order the agency concerned to take any action appropriate to carry out the decision of the panel.

#### Subpart E—Compliance Enforcement

#### § 1201.171 Enforcement of Board orders.

(a) *Notice to show cause.* The Board may, on petition or its own motion, issue a notice to show cause to any Federal employee, as to why he/she has failed to comply with the order of the Board. Such notice may require the employee or his/her representative to appear before the Board within a reasonable time period under the circumstance or may permit the employee to respond to the order in writing.

(b) *Hearing.* If the Board determines to hold a hearing on a notice to show cause, it shall be on the record.

(c) *Certification to the Comptroller General.* Where appropriate, following hearing the Board may, pursuant to 5 U.S.C. 1205(d)(2), certify to the Comptroller General of the United States that no payment shall be made to the employee failing to comply with the Board's order, other than a Presidential appointee subject to confirmation by the Senate.

#### PART 1202—STATUTORY REVIEW BOARDS

#### § 1202.1 Designation of Chair of Statutory Review Boards.

Upon written request by the agency—

(a) The Chair of the Board shall designate a hearing officer of the Board to serve as Chair of the Boards of Review, established by the Secretary of Transportation pursuant to 5 U.S.C. 3383(b) for review of certain actions to remove air traffic controllers.

(b) The Board shall designate qualified employees of the Board to serve as chairs of performance rating review boards which may be required to be established pursuant to 5 U.S.C. 4302(b) of the Act as in effect immediately before the effective date of the Act until such time that all reviews of performance ratings pending on the effective date of the Act have been disposed of.

#### APPENDIX I—MERIT SYSTEMS PROTECTION BOARD APPEAL FORM

The purpose of this form is to facilitate your filing an appeal with the Merit Systems Protection Board ("the Board") from an action or determination which was taken against you or made by a Federal agency. You are not required to use this form or to limit yourself to answering the questions on the form. If you do, however, it will make it easier for you to provide the information to the Board which it needs to decide your case. If you don't use this form, your petition for appeal must otherwise comply with the Board's regulations which can be found at Part 1200 of Title 5 of the Code of Federal Regulations or Volume—page—of the FEDERAL REGISTER (June, 1979). Your personnel office will assist you in obtaining these regulations and the Board advises you to review them.

*Privacy Act Statement:* This form requests personal information which is relevant and necessary to reach a decision in your appeal. The Merit Systems Protection Board collects this information in order to process appeals under its statutory and regulatory authority. Since your appeal is a voluntary action you are not required to provide any personal information in connection with it. However, failure to supply the Merit Systems Protection Board with all the information essential to reach a decision in your case could result in the rejection of your appeal.

The decisions of the Merit Systems Protection Board on appeal are final administrative decisions and, as such are available to the public under the provisions of the Freedom of Information Act. Some information about your appeal will also be used in depersonalized form as a data base for program statistics. If there is a need to disclose information from your appeal file for reasons other than these, or those cited in the Privacy Act (5 U.S.C. 552a(b)) or as required by the Freedom of Information Act (5 U.S.C. 552a), your prior written consent will be obtained.

#### SECTION I: GENERAL

1. Your Name: Last First Middle
2. Your Social Security Number:
3. Your Present Address: Street No.: City: State and Zip Code:
4. Home Phone: ( )
5. Office Phone: ( )

<sup>1</sup>In filling out this form, wherever the space provided is insufficient you may add additional pages. If you do so, please put your name and Social Security number at the top of the page, and indicate which number question you are answering.

6. Agency Taking Action:
7. Bureau Within Agency:
8. Location of Agency: (Street, City, State)
9. Position Title:
10. Grade and Salary:
11. Veteran: Yes ( ) No ( )
12. Type of Appointment: (a) Temporary ( ) Permanent ( ) Applicant ( ) Term ( ) (b) Competitive ( ) Excepted ( ) (c) Length of Government Service: (d) Length of Service with Agency in Item 6: (e) If Annuitant, Date of Retirement: (f) Were you serving a probationary or trial period on the date of the action appealed? Yes ( ) No ( )

#### SECTION II. ACTION TAKEN

13. What was the date you received the proposed notice to take this action? (Day, Month, Year) / / Attach copy of notice.

14. What was the date you received notice of the decision to take this action (or date determination was received)? (Date, Month, Year) / / Attach copy of notice.

15. What is (was) the effective date of this action or determination? (Date, Month, Year) / /

16. What was the action (or determination) (for example: removal, suspension, denial or retirement benefits) taken by the agency? Explain briefly and attach any relevant documents.

17. Why do you think the agency was wrong in taking this action? Explain briefly and attach any relevant documents.

18. Have you, or anyone on your behalf, filed an appeal, a grievance, or a complaint with your agency or any other agency concerning this matter? Yes — No —

If yes, when (date) \_\_\_\_\_ Where or with whom \_\_\_\_\_

- Basis for appeal, grievance or complaint

Has a decision been issued? Yes — No —

If so, when \_\_\_\_\_ By whom \_\_\_\_\_ Title \_\_\_\_\_

Attach copy.

19. (A) If you believe that the action of the agency was based on prohibited discrimination because of your race, color, religion, sex, national origin, marital status, political affiliation, handicapping condition or age, indicate so and explain why you believe this to be true. It is not sufficient to just state that there was discrimination. You must by examples or otherwise, indicate how you were discriminated against.

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19. (B) Have you filed a discrimination complaint with your agency or any other agency?

Date filed: \_\_\_\_\_  
Place of filing: \_\_\_\_\_

Has there been a decision? Yes ( ) No ( )

If "yes" attach copy.

20. What action would you like the Board to take in this case?

## SECTION III. REDUCTION-IN-FORCE

*Fill out this Section only if you are appealing from a reduction-in-force*

21. Tenure Sub-Group

22. Service Computation Date

23. Has your agency offered you another position in lieu of separation? Yes ( ) No ( )

If your answer is "Yes," please give the following information:

- (A) Title of position offered to you \_\_\_\_\_  
(B) Grade and salary of position offered to you \_\_\_\_\_  
(C) Location of position offered \_\_\_\_\_

(D) Did you accept this position? Yes ( ) No ( )

24. Please answer the questions below if they are relevant to the basis for your appeal. For those boxes checked, please give us as much information as possible to substantiate your claim:

a. Agency made an error in computing my service computation date. Explain:

b. I was placed in the wrong tenure sub-group. Explain:

c. My competitive area is too narrow. Explain and identify each position you believe should have been included in your competitive level:

d. My competitive level is too narrow (or broad). Explain:

e. I believe that I was improperly reached for separation from my competitive level. Explain:

f. An exception to the regular order of selection was made in my case. I was not given sufficient reasons to explain why employees with lower retention were retained. Explain:

g. I was not given full 30-day notice. Explain:

h. I believe that I am qualified to "bump" a person or persons in lower tenure sub-group. (For each such person, give name, title of position, and grade.) Explain:

i. (Other) Explain:

## SECTION IV. HEARING

25. You have a right to a hearing on this appeal. If you do not want to have

a hearing the Board will make its decision on the basis of the documents which you and the agency submit. Do you want a hearing? Yes ( ) No ( )  
If you choose to have a hearing the Board will notify you when and where it is to be held.

26. You have the right to designate someone to represent you on this appeal if he/she agrees to do so and has the necessary time. This person does not have to be an attorney. You may change this designation at a later date if you so desire, but must notify all the parties and the Board of this change. Please provide the name of this representative:

Name: Last First Middle

Employer:

Address: (Street, City, State, Zip):

27. You may be permitted to call witnesses at a hearing upon the approval of the presiding official. If you intend to do so, provide their names and a brief statement of their relationship to the case. You will be permitted to request other interests later if you do not list them now.

(1) Name:

Relationship to case:

(2) Name:

Relationship to case:

(3) Name:

Relationship to case:

27. Additional comments or information you would like to supply.

Your Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Signature of Representative (if any): \_\_\_\_\_

Date: \_\_\_\_\_

You or your representative are required to file two (2) copies of this form and attachments with the Board's field office as specified in the decision notice provided by the agency. Additionally, you must provide one (1) copy of this form to the agency representative identified in that notice. This must be done each time you file something with the Board.

You may provide a copy of your appeal to the agency representative by mail or personal delivery. If you do so by mail, you must put it in a public mailbox after filling out Form A below which should be attached to your appeal. If you deliver it personally you must take it to the business office of the agency representative and leave it with the representative or someone in his/her office (e. g., a secretary) after filling out and attaching Form B below.

## FORM A

## CERTIFICATE OF SERVICE (BY MAIL)

I hereby certify that I have mailed a copy of this petition this day in the City of \_\_\_\_\_, state of \_\_\_\_\_, by depositing it in a mailbox of the United States Postal Service. This copy was addressed to: Name \_\_\_\_\_ at Address \_\_\_\_\_.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Address: \_\_\_\_\_

## APPENDIX II—APPROPRIATE FIELD OFFICE FOR FILING APPEALS

All submissions shall be addressed to the Chief Appeals Officer, Merit Systems Protection Board at the below-listed addresses, according to geographic region of employing agency.

## Address of Appropriate Field Office and Area where Agency is Located

1. 1340 Spring Street, Atlanta, Georgia 30309—Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee.

2. 100 Summer Street, Room 1736, Boston, Massachusetts 02110—Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont.

3. Federal Office Building, 31st Floor, 230 South Dearborn Street, Chicago, Illinois 60604—Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin.

4. 1100 Commerce Street, Dallas, Texas 75242—Arkansas, Louisiana, New Mexico, Oklahoma, Texas, Swan Island.

5. Building 46, Denver Federal Center, Box 25025, Denver, Colorado 80225—Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming.

6. New Federal Building, 26 Federal Plaza, New York, New York 10007—New Jersey, New York, Puerto Rico, Virgin Islands.

7. U.S. Customhouse, Rm. 501, Second and Chestnut Streets, Philadelphia, Pennsylvania 19106—Delaware, Maryland, Pennsylvania, Virginia, West Virginia.

8. 525 Market Street, San Francisco, California 94105—Arizona, California, Hawaii, Nevada, Pacific Ocean area.

9. Federal Building, 26th Floor, 915 Second Avenue, Seattle, Washington 98174—Alaska, Idaho, Oregon, Washington.

10. 1256 Federal Building, 1520 Market Street, St. Louis, Missouri 63103—Iowa, Kansas, Missouri, Nebraska.

11. Washington Field Office, 1717 H Street, Washington, D.C. 20419—Washington, D.C. Metropolitan area, all overseas areas not otherwise covered.

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